



## Office of the Attorney General

State of Texas

June 21, 1993

DAN MORALES

ATTORNEY GENERAL

Mr. William J. Delmore, III  
General Counsel  
Office of the District Attorney  
Harris County  
201 Fannin Suite 200  
Houston, Texas 77002-1901

OR93-334

Dear Mr. Delmore:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), article 6252-17a, V.T.C.S. Your request was assigned ID# 19892.

The Harris County District Attorney's Office (the "district attorney") has received a request for certain photographs relating to an automobile accident that occurred on January 5, 1991, in which two persons were killed. Specifically, the requestor seeks photographs depicting the accident scene, the vehicles involved, and injuries relating to the accident. You have submitted to us for review photographs of the scene and the vehicles involved in the accident and morgue photographs of the decedents and their fatal injuries. You claim that these photographs are excepted from required public disclosure under the act.

As a threshold issue, we first address your contention that the district attorney's office is a part of the judiciary within the meaning of section 2(1)(H) of the act and therefore is not subject to the act. We rejected this argument in a recent ruling issued to your office, Open Records Letter No. 93-213 (1993). As we stated in that letter, a district attorney's office does not fall within the judiciary exception because it is not a court and is not directly controlled or supervised by one and because its functions are primarily executive in that its primary duty is to enforce the law. *See* Attorney General Opinion JM-266 (1984). Furthermore, the district attorney is an entity that is supported by or expends public funds. V.T.C.S. art. 6252-17a, § 2(1)(G) (definition of governmental body). Accordingly, the district attorney is subject to the act and must release the requested information unless it falls within one of the exceptions enumerated in section 3(a) of the act. You claim that the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the act.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that release of the photographs of the decedents and their injuries should be withheld under section 3(a)(1) in conjunction with privacy doctrine. You argue that

the morgue photographs of the deceased should be found unavailable under subsection 3(a)(1), in deference to the privacy rights of the victims' families, and in order to avoid infliction of unnecessary emotional harm upon such families. Many of these photographs graphically portray horrible wounds, as well as the unclothed private parts of the deceased and, in some cases, the decomposition of the body of the deceased.<sup>1</sup>

An individual's right of privacy lapses upon death. Attorney General Opinion JM-229 (1984) at 3. Moreover, Texas law does not permit the family of a deceased person to maintain an action based on the deceased's right of privacy because that right is personal. See Open Records Decision No. 432 (1985) (finding photographs of accident scene subject to disclosure under the act). Accordingly, we conclude that the requested information is not excepted from disclosure by privacy doctrine.

You also claim that the requested information is excepted by section 3(a)(1) because it constitutes work product and is subject to the "law enforcement privilege" set forth in *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987). This argument, too, was rejected in Open Records Letter No. 93-213. As we stated in that ruling, section 3(a)(1) does not encompass work product or discovery privileges. Open Records Decision No. 575 (1990). Information subject to such privileges may be excepted from disclosure under section 3(a)(3), if the requirements of that section are met.<sup>2</sup>

### Section 3(a)(3) excepts

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<sup>1</sup>You also object to release of the photographs because some requestors "could . . . include persons desiring them for pornographic or other unacceptable purposes." Section 5 of the act, however, prohibits a governmental body from making "any inquiry of any person who applies for inspection or copying of public records beyond the purpose of establishing proper identification and the public records being requested," and it "shall treat each request for information uniformly without regard to the position or occupation of the person making the request." V.T.C.S. art. 6252-17a, § 5(b), (c). Thus, the Open Records Act does not permit consideration of the motives of the requesting party. Open Records Decision Nos. 542 (1990); 508 (1988); 161 (1978); 127 (1976) at 6.

<sup>2</sup>Please note that section 14(f) of the act, added by the 71st Legislature in 1989, chapter 1248, section 18 provides in part that "exceptions from disclosure under this Act do not create new privileges from discovery." Accordingly, the *Hobson* court's apparent use of section 3(a)(8) as a basis for the "law enforcement privilege" is no longer valid.

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly related to that litigation. Open Records Decision No. 551 (1990). Section 3(e) provides that for purposes of section 3(a)(3), "the state . . . is considered to be a party to litigation of a criminal nature until . . . the defendant has exhausted all appellate and postconviction remedies in state and federal court." V.T.C.S. art. 6252-17a, § 3(e). Section 3(e), however, is not a separate exception to disclosure. Rather, it merely provides a time frame for information excepted under section 3(a)(3); section 3(e) is inapplicable unless the governmental body has established that litigation in a specific matter is pending or reasonably anticipated and that the information clearly relates to that litigation. Open Records Decision No. 518 (1989) at 5.

You advise us that the defendant in the case at issue here entered a plea of nolo contendere to the offense of involuntary manslaughter and that the trial court subsequently deferred adjudication of his guilt and placed him on probation for ten years. You have not, however, provided us with information indicating that the defendant has not exhausted all of his appellate and postconviction remedies in state and federal court, nor have you provided us with any information demonstrating the pendency or reasonable likelihood of litigation. We therefore have no basis on which to conclude that the requested photographs relate to pending or anticipated litigation. Accordingly, the requested photographs may not be withheld from required public disclosure under section 3(a)(3) of the Open Records Act.

#### Section 3(a)(8) excepts

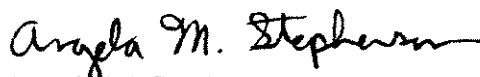
records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

As stated in Open Records Letter No. 93-213 (1993), this office is not persuaded by your contention that our long-standing application of section 3(a)(8) to closed criminal files is incorrect. Therefore, the test for determining whether information regarding closed investigations is excepted from public disclosure under section 3(a)(8) is whether release of the records would unduly interfere with the prevention of crime and the enforcement of

the law. Open Records Decision No. 553 (1990) at 4 (and cases cited therein). A governmental body claiming the "law enforcement" exception must reasonably explain how and why release of the requested information would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 434 (1986) at 2-3. You make no claim that the release of the information at issue here would unduly interfere with law enforcement. Accordingly, the requested photographs may not be withheld from required public disclosure under section 3(a)(8) of the Open Records Act and must be released in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Angela M. Stepherson  
Assistant Attorney General  
Opinion Committee

AMS/GCK/jmn

Ref: ID# 19892

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